

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TK POWER, INC.,

No. C-04-5098 EMC

Plaintiff,

v.

**ORDER RE DEPOSITION TESTIMONY
OF STACEY GORDON**

TEXTRON, INC.,

Defendant.

TK seeks to introduce in its case-in-chief excerpts from the discovery deposition testimony of Stacey Gordon. Gordon will not appear live at trial but, pursuant to this Court's Pretrial Conference Order of April 28, 2006, will appear via a videotaped trial deposition taken last week. Textron now objects to TK's use of the discovery deposition as improper hearsay.

The objection is **OVERRULED**. This Court's First Amended Case Management and Pretrial Order of December 9, 2005 requires each party, before the Pretrial Conference, to "Designate excerpts from discovery that the parties intend to present at trial, other than solely for impeachment or rebuttal, from depositions specifying the witness page and line references . . . " Para. 5(d)(iii). Clearly, such designations encompass excerpts intended to be used in the designating party's case-in-chief since it excludes those excerpts used for "impeachment or rebuttal." TK served and filed such designations as part of the parties' Joint Amended Pretrial Statement filed herein. In response to the designation, Textron stated it had no objection to the designations from the Gordon discovery deposition. It therefore waived any right to object on the grounds of hearsay, knowing that TK's designation encompassed possible use in its case-in-chief. This is so even though at the

1 time Textron anticipated Gordon would be available to testify live at trial. It had a hearsay ground
2 for objection but failed to make one. That Gordon will now testify via the videotaped trial
3 deposition taken last week instead of live, makes no difference. Textron had the opportunity to
4 object on basis of hearsay but failed to do so.


5 Moreover, the fact that Textron has been given the ability to examine and/or cross-examine
6 Gordon in the trial deposition which can be admitted into evidence satisfies any fairness concerns
7 that might have arisen if TK were permitted to introduce into evidence a one-sided discovery
8 deposition in which Textron decided not to cross for tactical reasons.

9 As to Textron's objections that TK's questions at the discovery deposition might have been
10 leading, this Court's standing Order for Civil Practice in Cases Assigned for All Purposes to
11 Magistrate Judge Edward M. Chen states that "Deposition objections must be as to privilege or form
12 only." (Para. 18.) If Textron did object on the deposition record on the ground of leading questions
13 and wants to now assert the objection at trial, it must alert the Court in advance so the Court can rule
14 and either require the answer to any sustained objection be deleted from the videotape or the jury
15 instructed to disregard the answer. If no objection was made at the deposition, it is waived.

16 Textron's objection to the use of the Gordon discovery deposition is overruled.

17
18 IT IS SO ORDERED.

19
20 Dated: May 9, 2006

21 
22 _____
23 EDWARD M. CHEN
24 United States Magistrate Judge
25
26
27
28